U.S. Department of Labor

Office of Administrative Law Judges
St. Tammy Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, Louisiana 70433

(985) 809-5173
(985) 893-7351 (FAX)

Issue Date: 21 June 2006

CASE NO.: 2005-LHC-1556

OWCP NO.: 08-123889

IN THE MATTER OF

LAWRENCE T. McKEE,
Claimant

v.

HANNAH MARINE CORPORATION,
Employer

APPEARANCES:

Lawrence T. McKee,
Pro Se Claimant

Jeffrey N. Covinsky,
President Hannah Marine Corporation
On behalf of Pro Se Employer

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("the Act"), 33 *U.S.C.* §901, *et. seq.*, brought by Lawrence T. McKee ("Claimant") against Hannah Marine Corporation ("Employer"). The issues raised by the parties could not be resolved administratively, and the matter was referred to the undersigned in the Office of Administrative Law Judges for a formal hearing. The hearing was held on October 25, 2005 in Memphis, Tennessee. A subsequent on the record telephone conference between the parties and the undersigned was held on March 15, 2006.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced fourteen (14) exhibits, which were admitted, including: opinion letter from Dr. C.W. Mineck; journal article authored by John K. Niparko, M.D. regarding hearing

loss; audiogram dated April 29, 2004; interpretation of audiogram prepared by Kay Pusakulich, Chief Audiologist at the Veteran's Hospital in Memphis, Tennessee; requests for release of Claimant's medical records dated April 29, 2004 and May 4, 2004; LS-201; letter from Claimant to Ed Hogan, Vice President of Hannah Marine dated May 7, 2004; LS-203; letter to Claimant from Jeffrey Covinsky, President of Hannah Marine dated May 19, 2004; letter to Jeffrey Covinsky from Claimant dated April 19, 2005; LS-18; notarized statement from Deborah Bohr regarding Claimant's employment with Hannah Marine and notarized statement from Nancy McKee regarding Claimant's other employment; LS-557; and letters and information forwarded by Claimant to Hannah Marine.[1] Employer submitted no exhibits.

Neither party filed a post-hearing brief. Based upon the stipulations of the parties, the admitted evidence, my observation of the witness' demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

1. The average weekly wage to be used in determining a compensation award is the applicable national average weekly wage in July of 1982.

II. ISSUES

1. Timeliness of claim;

2. Causation;

3. Nature and extent of injury;

4. Average weekly wage; and

5. Penalties.

III. STATEMENT OF THE CASE

Claimant is a sixty-four (64) year old male who currently resides in Byhalia, Mississippi. (Tr. 13). Claimant worked for Employer from July, 1969, to June, 1974, and from November 1978 to July 1982. (Tr. 13-14). Claimant worked as a shore tankerman for Employer throughout the entire Great Lakes area. (Tr. 14-15). Part of Claimant's duties as a shore tankerman was to load and offload fuel from tank barges. (Tr. 15-16). While performing this duty, Claimant was exposed to high volume noise in engine rooms of the tank barges. (Tr. 17-19). The engine rooms on most of the tank barges on which Claimant worked were totally or semi-enclosed. (Tr. 17). The engine and pump machinery on only four of the tank barges were not at all enclosed. (Tr. 17).

[1] References to the transcripts and exhibits are as follows: trial transcript- Tr.___; telephone conference transcript- Tc.___; Claimant's exhibits- CX__, p.__; Administrative Law Judge exhibits- ALJX__; p.___.

From 1974 to over three (3) years later to his return to work for Employer in 1978 and again after he left Employer's employ in July of 1982, Claimant worked in sales until his retirement in 1999. (Tr. 14, 22-24, 34). Claimant has not worked on a merchant marine vessel, barge or tanker other than his work on tank barges for Employer. (Tr. 23). On April 29, 2004, Claimant had his hearing tested, which resulted in his being given an audiogram showing a rateable hearing loss in his left ear. (Tr. 25; CX 7, p. 18). On May 7, 2004, Claimant sent a letter to Employer informing Employer of his hearing loss and his allegations that such loss was a result of his work as a shore tankerman with Employer.[2] (CX 7, p. 18-19). Claimant submitted a LS-201 and LS-203 form to the Office of Workers' Compensation Programs on May 8, 2004. (CX 6, p. 17; CX 8, p. 22-23). On May 19, 2004 Employer sent a responsive letter to Claimant's May 7, 2004 letter wherein Employer denied Claimant's claim that his hearing loss was a result of his employment with Employer. (CX 9, p. 24). Claimant sent Employer another letter on April 19, 2005 together with a LS-18 pre-hearing statement. (CX 10, p. 25). The matter was referred to the Office of Administrative Law Judges for formal hearing on April 29, 2005 and was scheduled for hearing before the undersigned on October 25, 2005. (CX 14, p. 35, 38).

B. Audiological Records

On April 29, 2004 Claimant underwent an audiological evaluation. (CX 3, p. 12). As a result of this evaluation, Claimant received an audiogram, a progress note from a Dr. Mineck and another progress note from Kay Pusakulich, Chief Audiologist. (CX 1, p. 1; CX 3, p. 12; CX 4, p. 14). The progress note from Dr. Mineck indicated that Claimant had decreased hearing in his left ear and that Claimant was exposed to significant noise as a merchant marine. (CX 1, p. 1). The progress note from Kay Pusakulich noted Claimant suffers from mild to sharply sloping to severe loss of hearing. (CX 4, p. 14).

Following the October 25, 2005 hearing in this matter, Claimant submitted to Employer and the undersigned a letter from Kay Pusakulich, Chief Audiologist at the Veteran's hospital in Memphis, Tennessee.[3] In this letter Audiologist Pusakulich states that Claimant's hearing loss is most likely a result of his exposure to excessive noise in loud engine rooms during his employment with Employer. (ALJX 1, p. 2). Audiologist Pusakulich further states that under the compensation formula used by the Veteran's Administration for Compensation and Pension Examinations, Claimant would be awarded 10% Service Connection for his hearing loss. (Id.).

During the March 15, 2006 on the record telephone conference between the parties and the undersigned, Claimant agreed to obtain from his audiologist documentation regarding a percentage of hearing loss based on monaural and binaural computations. (Tc. 47). After the

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[2] In 1973 while working for Employer, Claimant suffered an injury to his right ear as a result of being struck by a boom. Claimant received treatment for this injury and also accepted a payment for settlement from Employer's Carrier and Mobil Oil. Claimant subsequently lost his hearing in this ear due to acoustic neuroma. Neither Claimant's 1973 injury nor his subsequent acoustic neuroma is in issue in this case. (Tr. 6, 24, 37; CX 7, p. 18-20).

[3] Claimant provided this letter pursuant to the undersigned's request at the October 25, 2005 hearing. For purposes of identification, this letter shall be included in the record and identified as ALJX 1.

telephone conference, Audiologist Pusakulich requested a note from the undersigned clarifying exactly what information was needed. Subsequently, Audiologist Pusakulich submitted a letter dated April 4, 2006 to the undersigned, indicating Claimant's percentage of hearing loss based on monaural and binaural computations.[4] According to Audiologist Pusakulich, Claimant has a monaural hearing impairment of 33.8% and a binaural hearing impairment of 44.8%. (ALJX 2, p. 1).

C. Claimant's Testimony

Claimant worked for Employer from July, 1969, to June, 1974, and from November 1978 to July 1982. (Tr. 13-14). Claimant worked as a shore tankerman for Employer throughout the entire Great Lakes area. (Tr. 14-15). According to Claimant, the duties of a shore tankerman include responsibility for safely loading and unloading inflammable, combustible, chemical materials. (Tr. 14). In order to perform these duties, Claimant testified he was required to possess a tankerman's license. (Tr. 15). While performing his job duties, Claimant was exposed to high volume noise in engine rooms of tank barges. (Tr. 17-19). The engine rooms on most of the tank barges on which Claimant worked were totally or semi-enclosed. (Tr. 17). The engine and pump machinery on only four types of the tank barges were not at all enclosed. (Tr. 17).

According to Claimant, diesel engines that powered deep well pumps were the equipment used to transfer fuel to and from the tank barges. (Tr. 17). Claimant testified that the time at which he was exposed to the most noise in the engine rooms was during unloading of the fuel. (Tr. 17-18). Claimant testified further that the engine rooms were relatively quiet during loading of the fuel. (Tr. 17). Claimant also testified that he was exposed to a lot of high volume noise during times when boilers which were used to heat the asphalt of the black oil were operating. (Tr. 17-18). Claimant described the noise to which he was exposed as very high pitch and very consistent. (Tr. 19). According to Claimant, the noise exposure was such that one could not participate in a normal conversation. (Id.). Claimant stated that if one wished to converse with another, one would have to shout in order to do so due to the loud noise in the engine rooms. (Id.).

Claimant testified that he had to maintain close proximity to the pumps in the engine rooms in order to ensure that they continued to work properly. (Tr. 19-20). Claimant stated that if the pumps did not work properly he as a tankerman would have been liable for pollution as would have Employer. (Tr. 20). Claimant stated further that he never received a citation for such a violation in all the years he worked for Employer. (Id.). When asked how many hours he worked a day, Claimant stated that he worked 101 hours in one pay period. (Tr. 21). Claimant also stated that before he left Employer's employ for the last time in July of 1982, he worked 40, 41, or 42 hours a pay period. (Tr. 22).

From 1974 to over three (3) years later to his return to work for Employer in 1978 and again after he left Employer's employ in 1982, Claimant worked in sales until his retirement in 1999. (Tr. 14, 22-24, 34). Besides his work for Employer, Claimant testified that he sold cars,

[4] A copy of this letter was forwarded by this office to both Claimant and Employer. For purposes of identification, this letter shall be included in the record and identified as ALJX 2.

briefly maintained a marketing company, and owned some oil wells. (Tr. 23). Claimant testified further that has not worked on a merchant marine vessel, barge or tanker other than his work on tank barges for Employer. (Id.). According to Claimant, at no other time other than his time with Employer, was he exposed to high frequency noise. (Id.). When asked what was the degree of his hearing loss Claimant stated that he did not know, but that he could request an impairment rating from his audiologist. (Tr. 25-27). Claimant also stated that he would obtain documentation from his audiologist regarding causation of his hearing loss. (Tr. 47-52). Employer stated that it had no desire to have Claimant examined by a medical professional. (Tr. 50-51).

Claimant, when asked what rate of compensation he was seeking, testified that he thought it should be the average weekly wage at the date of the injury/discovery. (Tr. 33). In the subsequent on the record telephone conference on March 15, 2006, Claimant and Employer both stated that they did not have records regarding Claimant's rate of compensation around the time he last worked for Employer. (Tc. 14, 16). Claimant stated that he would obtain his earnings records from Social Security so the undersigned could determine or approximate Claimant's average weekly wage when he last worked for Employer in 1982. (Tc. 19). Following this telephone conference, Claimant informed the undersigned that he would not be obtaining his earnings records from Social Security and stipulated that the rate of compensation be the national average weekly wage.

IV. DISCUSSION

A. Argument of the Parties

Claimant contends that his hearing loss is a result of his exposure to loud noise while working as a shore tankerman for Employer. (Tr. 48-52; CX 1, p. 1; ALJX 1, p. 2). Claimant further contends that since Employer was the only maritime employer to employ him and since it was during his employment with Employer that he was exposed to loud noise, Employer is liable for his hearing loss. (Tr. 53-54). Moreover, Claimant argues that notice of his claim for compensation was timely, citing 33 *U.S.C.* §908(C)(13)(d); ***Mauk v. Northwest Marine Iron Works***, 25 BRBS 118, 123 (1991).

Additionally, Claimant argues that under the Act he should be compensated for his whole person. (Tr. 27-28). In other words, Claimant argues that any compensation for his hearing impairment should be based on a binaural hearing loss, citing ***Garner v. Newport News Shipbuilding and Dry Dock, Co.*** (Tr. 28). Claimant also argues that Employer did not file a Notice of Controversion as required by the Act. (Tc. 34-35).

Employer argues that Claimant's claim for compensation is time-barred as Claimant last worked for Employer in 1982 and did not present his claim until 2004. (Tr. 9-10). Employer further argues that Claimant failed to establish that his work for employer caused his hearing loss. (Tr. 35-37, 45-46). In addition, Employer maintains that it sent a responsive letter to the Office of Workers' Compensation Programs but it did not file a formal Notice of Controversion because it did not know that a claim had been filed. (Tc. 38-39, 43-44).

B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. ***Banks v. Chicago Grain Trimmers Association, Inc.***, 390 U.S. 459, 467 (1968); ***Louisiana Insurance Guaranty Ass'n v. Bunol***, 211 F.3d 294, 297 (5th Cir. 2000); ***Hall v. Consolidated Employment Systems, Inc.***, 139 F.3d 1025, 1032 (5th Cir. 1998); ***Atlantic Marine, Inc. v. Bruce***, 551 F.2d 898, 900 (5th Cir. 1981); ***Arnold v. Nabors Offshore Drilling, Inc.***, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. ***Banks v. Chicago Grain Trimmers Association, Inc.***, 390 U.S. at 467; ***Mijangos v. Avonldale Shipyards, Inc.***, 948 F.2d 941, 945 (5th Cir. 1991); ***Huff v. Mike Fink Restaurant, Benson's Inc.***, 33 BRBS 179, 183 (1999). Here, based on the record as a whole and my observations of the witness, I am convinced that Claimant is a sincere and honest witness. Overall, I was very impressed by Claimant's testimony.

C. Timeliness of Claim

Under Section 8(C)(13)(d) of the Act as amended in 1984, the time for filing a notice of a hearing loss pursuant to Section 12, or a claim for compensation pursuant to Section 13 does not begin to run until the claimant has received an audiogram and an accompanying report indicating a loss of hearing and a causal connection between his employment and loss of hearing. 33 *U.S.C.* 908(C)(13)(d); ***See also***, ***Vaughn v. Ingalls Shipbuilding, Inc.***, 28 BRBS 129 (1994)(*en banc*); ***Grace v. Bath Iron Works Corp.***, 21 BRBS 244 (1988). Traditionally, the Benefits Review Board has held that the extended time limitations for occupational diseases apply to loss of hearing claims. ***See e.g.***, ***Cox v. Brady Hamilton Stevedore Co.***, 18 BRBS 10 (1985). However, the Supreme Court has held that a work-related hearing loss "is not an occupational disease that does not 'immediately result in disability.'" ***Bath Iron Works Corp. v. Director***, 506 U.S. 153, 163 (1993), quoting 33 *U.S.C.* §910(i); ***See also***, ***Bath Iron Works Corp. v. Director***, 506 U.S. at 166 (stating, "claims for hearing loss, whether filed by current workers or retirees, are claims for a scheduled injury."). [5] Following this Supreme Court decision it is clear that a work-related hearing loss is not an occupational illness within the meaning of the Act. ***See e.g.***, ***Coffey v. Marine Terminals Corp.***, 33 BRBS 699 (1999); ***Vaughn v. Ingalls Shipbuilding, Inc.***, 28 BRBS 129 (1994); ***Bellmer v. Jones Oregon Stevedoring Co.***, 27 BRBS 317 (1993). Therefore, notice of a claim for hearing loss whether filed by a current employee or a retiree must be filed within the thirty (30) day time limit prescribed by Section 12. ***Bath Iron Works Corp. v. Director***, 506 U.S. at 166-167; ***See also***, ***Coffey v. Marine Terminals Corp.***, 33 BRBS 699; ***Vaughn v. Ingalls Shipbuilding, Inc.***, 28 BRBS 129; ***Bellmer v. Jones Oregon Stevedoring Co.***, 27 BRBS 317.

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[5] In so holding, the Supreme Court stated that such claims must be compensated pursuant to the standards of Section 8(C)(13) and not Section 8(C)(23) percentage of impairment of the whole person standard. ***Bath Iron Works Corp. v. Director***, 506 U.S. at 166-167.

In the instant case, Claimant received an audiogram and accompanying progress notes on April 29, 2004. (CX 1, p. 1; CX 3, p. 12; CX 4, p. 14). The progress note prepared by Dr. Mineck indicated that Claimant had decreased hearing in his left ear and noted that Claimant was exposed to significant noise as a merchant marine working in enclosed engine rooms. (CX 1, p. 1). On May 7, 2004, Claimant sent a letter to Employer informing Employer of his hearing loss and his allegations that such loss was a result of his work as a shore tankerman for Employer. And on May 8, 2004 Claimant submitted a LS-201 and LS-203 form to the Office of Workers' Compensation Programs. (CX 6, p. 17; CX 8, p. 22-23).

Under Section 8(C)(13)(d) of the Act the thirty (30) day time period under Section 12 begins to run when a claimant receives an audiogram and an accompanying report indicating a loss of hearing and a causal connection between his employment and loss of hearing. 33 *U.S.C.* §908(C)(13)(d); 33 *U.S.C.* §912(a). Here, Claimant received such an audiogram and report on April 29, 2004. (CX 1, p. 1; CX 3, p. 12). Therefore, in order for Claimant's notice of his claim to be timely, he must have given notice to Employer of his claim prior to May 29, 2004. Claimant provided Employer with notice of his claim in his letter to Employer on May 7, 2004 and through his filing of a LS-201 with the Office of Workers' Compensation Programs on May 8, 2004. Such notice was well in advance of May 29, 2004. Accordingly, I find that Claimant provided timely notice of his claim to Employer.

D. Causation

Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 *U.S.C.* §920(a). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. ***Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter***, 227 F.3d 285, 287 (5th Cir. 2000); ***O'Kelly v. Department of the Army***, 34 BRBS 39, 40 (2000); ***Kier v. Bethlehem Steel Corp.***, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. ***Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter***, 227 F.3d *at 287*. However, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." ***U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP***, 455 U.S. 608 (1982). *See also,* ***Bludworth Shipyard Inc., v. Lira***, 700 F.2d 1046, 1049 (5th Cir. 1983); ***Devine v. Atlantic Container Lines***, 25 BRBS 15, 19 (1990).

To show harm or injury a claimant must show that something has gone wrong with the human frame. ***Crawford v. Director, OWCP***, 932 F.2d 152, 154 (2nd Cir. 1991); ***Wheatley v. Adler***, 407 F.2d 307, 311-12 (D.C.Cir. 1968); ***Southern Stevedoring Corp. v. Henderson***, 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event, or episode. ***Adkins v. Safeway Stores, Inc.***, 6 BRBS 513, 517 (1978). Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions

that could conceivably cause the harm alleged beyond a "mere fancy or wisp of 'what might have been.'" ***Wheatley v. Adler***, 407 F.2d at 313. A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. ***Hampton v. Bethlehem Steel Corp.***, 24 BRBS 141, 144 (1990); ***Golden v. Eller & Co.***, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. ***Bonin v. Thames Valley Steel Corp.***, 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding ALJ ruling that the claimant did not produce credible evidence a condition existed at work which could have cause his depression); ***Alley v. Julius Garfinckel & Co.***, 3 BRBS 212, 214-15 (1976); ***Smith v. Cooper Stevedoring Co.***, 17 BRBS 721, 727 (1985) (ALJ).

To rebut the Section 20(a) presumption, the Employer must present substantial evidence that a claimant's condition is not caused by a work related accident or that the work related accident did not aggravate claimant's underlying condition. ***Port Copper/T. Smith Stevedoring Co. v. Hunter***, 227 F. 3d at 287; ***Gooden v. Director, OWCP***, 135 F. 3d 1066, 1068 (5th Cir. 1998). Here, there is no dispute that Claimant was exposed to loud noise during his employment with Employer. Rather, Employer argues that the noise to which Claimant was exposed has not been definitively proven to be the cause of Claimant's hearing loss. (Tr. 9). Claimant submitted a progress note from Dr. Mineck and an opinion letter from Audiologist Pusakulich which opine that Claimant's hearing loss is most likely attributable to his exposure to loud noise while working as a merchant marine. (CX 1, p. 1; ALJX 1, p. 2). Claimant testified that Employer was the only maritime employer for which he has worked. [6] (Tr. 23). Employer submitted no exhibits or testimony in rebuttal. Accordingly, I find Claimant established a *prima facie* claim for compensation and Employer failed to satisfy its rebuttal burden as required under Section 20(a). Consequently, I find Claimant suffered a workplace injury in the course and scope of his employment.

E. Nature and Extent of Injury

Under Section 8(C)(13) of the Act an audiogram provides Claimant with presumptive evidence as to the extent of his hearing loss if the following conditions are met:

> (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology;
> (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered; and
> (iii) no contrary audiogram made at that time is produced.

33 U.S.C. §908(C)(13). Here, Claimant received an audiogram that was administered by Kay Pusakulich, Chief Audiologist of the Veteran's Hospital in Memphis, Tennessee on April 29, 2004. (CX 3, p. 12). A copy of this audiogram was provided to Claimant together with progress

[6] In this regard, Claimant and Employer presented arguments regarding the "last employer rule." However, since it is clear from the record that Claimant had only one maritime employer that being Employer, analysis of these arguments is unnecessary.

notes on the same day. (CX 1, p. 1; CX 3, p. 12; CX 4, p. 14). No other audiogram contrary or otherwise was provided by either the Claimant or Employer. According to Audiologist Pusakulich' April 4, 2006 letter that clarifies Claimant's percentage of hearing loss indicated by the April 29, 2004 audiogram, Claimant has a monaural hearing impairment of 33.8%. (ALJX 2, p. 1). Since no contrary audiogram was produced in this matter and since the April 29, 2004 audiogram produced by Claimant satisfies the requirements of Section 8(C)(13), I find Claimant has a monaural hearing impairment of 33.8%.

F. Average Weekly Wage

Compensation for a work-related hearing loss should be determined based on a claimant's average weekly wage at the date of his last exposure to the injurious stimuli. ***Bath Iron Works Corp. v. Director***, 506 U.S. at 165. Section 8(C)(13) of the Act and its accompanying regulations, provides up to fifty-two (52) weeks of compensation for a claimant suffering from a monaural hearing impairment and up to two-hundred (200) weeks for a claimant suffering from a binaural hearing impairment. 33 *U.S.C.* §908(C)(13). In the instant case, Claimant last worked for Employer in July of 1982 and testified that at no other time during his tenure in the general workforce was he exposed to loud noise. (Tr. 13-14, 23). Therefore, Claimant's compensation for his loss of hearing should be based on his average weekly wage in 1982. However, neither Claimant nor Employer was able to provide the Court with any documentation as to Claimant's earnings in 1982. Instead, the parties agreed that the national average weekly wage be used in determining a compensation award. According to the Office of Workers' Compensation Programs Employment Standards Administration the national average weekly wage in July of 1982 was $248.35. Therefore, I find $248.35 to be the applicable average weekly wage for Claimant's monaural hearing loss.

H. Penalties

Under Section 14(b) of the Act the first installment of compensation to a claimant becomes due on the fourteenth day after the employer has been notified pursuant to Section 12(d), or after the employer has knowledge of claimant's injury. 33 *U.S.C.* §914(b); ***See also***, ***Howard v. Ingalls Shipbuilding, Inc.,*** 25 BRBS 192 (1991) (stating that benefits begin with the development of the first medical evidence sufficient to establish a hearing loss.). Section 14(d) sets forth the procedure for controverting the right to compensation, and it provides that an employer must file a notice of controversion on or before the fourteenth day after it has received notice pursuant to Section 12(d) or after it has knowledge of the injury. 33 *U.S.C.* §914(d); ***See also***, ***Spencer v. Baker Agricultural Co.***, 16 BRBS 205 (1984). However, Section 14(e) mandates that if an employer fails to pay benefits in accordance with Section 14(b) or timely controvert the claim in accordance with Section 14(d), then it shall be liable for a 10 percent penalty added to unpaid installments of compensation. ***Scott v. Tug Mate, Inc.***, 22 BRBS 164 (1989); ***Frisco v. Perini Corp.***, 14 BRBS 798 (1981).

A notice of controversion must include the following:

(1) a statement that the right to compensation is controverted;
(2) name of the claimant;

(3) name of the employer;
(4) the date of the alleged injury or death; and
(5) the grounds for controversion.

See, 33 *U.S.C.* §914(d); ***Ingalls Shipbuilding, Inc. v. Director***, 898 F. 2d 1088, 1095 (5th Cir. 1990), *rev'd on other grounds*. The fact that the claimant is aware of the employer's position does not affect employer's duty to file a notice of controversion since the Department of Labor Office of Workers' Compensation Programs must be notified. ***Rowe v. Western Pacific Dredging***, 12 BRBS 427 (1980), *overruled in part by*, ***Vlasic v. American President Lines***, 20 BRBS 188 (1987). Title of such notice is not determinative so long as the document contains all the information required by Section 14(d). ***Snowden v. Ingalls Shipbuilding, Inc.***, 25 BRBS 245 (1991), *aff'd on recon en banc*, 25 BRBS 346 (1992).

Here, Employer maintains that it submitted a responsive letter to the Office of Workers' Compensation Programs but not a formal Notice of Controversion because it did not know a claim had been filed. (Tc. 38-39, 43-44). However, this letter was not provided to the Court for inclusion in the record. Consequently, the record indicates that no notice of controversion was submitted by Employer. (CX 14, p. 32). Therefore, based on the record I find that Employer did not file a notice of controversion as required by Section 14(d) and that Employer is liable to Claimant for a 10 percent penalty under Section 14(e).

I. Conclusion

Claimant suffered a 33.8% monaural hearing loss as a result of his employment with Employer. Employer is liable to Claimant for 33.8% of fifty-two (52) weeks, or 17.576 weeks of compensation for such loss based on the national average weekly wage and corresponding compensation rate applicable in July of 1982 of $248.35. Employer is also liable for a 10 percent penalty added to unpaid installments of compensation to Claimant.

J. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. ***Avallone v. Todd Shipyards Corp.***, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. ***Watkins v. Newport News Shipbuilding & Dry Dock Co.***, *aff'd in pertinent part and rev'd on other grounds*; ***Newport News v. Director, OWCP***, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "[t]he fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 *U.S.C.* §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills." ***Grant v. Portland Stevedoring Company***, 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See*, ***Grant v. Portland Stevedoring Company***, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant 33.8% of fifty-two (52) weeks, or 17.576 weeks of compensation pursuant to Section 8(C)(13) of the Act commencing April 29, 2004 based on the national average weekly wage and corresponding weekly compensation rate of $248.35 for a total of $4,365.00 in compensation.

2. Employer shall pay to Claimant penalties on unpaid installments of compensation pursuant to Section 14(e) of the Act from April 29, 2004 to the date of the hearing in this matter, October 25, 2005.

3. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 *U.S.C.* §1961.

4. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

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CLEMENT J. KENNINGTON
Administrative Law Judge